

been established by adequate price competition are:

- (i) Contracts for items for which there are a limited number of sources and the prices at which award will be made are within a reasonable amount of each other and compare favorably with independent Government estimates and with prior prices paid;
- (ii) Any contract, including cost-type contracts, when cost is a significant evaluation factor; and
- (iii) Contracts for which there are dual sources.

PART 5242—CONTRACT ADMINISTRATION

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 2202, DOD Directive 5000.35

Subpart 5242.90—Refunds Requirements (Spares and Support Equipment)

5242.9000 Requests for refunds.

(a) *Policy.* (1) This subpart establishes uniform policy and procedures on requesting refunds for spare parts or items of support equipment. This policy is not intended to diminish the responsibility of Navy contracting personnel to properly price spare parts and items of support equipment. Further, it is not intended to serve as a mechanism for the recovery of excess profits.

(2) In accordance with the guidance set forth in paragraph (c) of this section, contracting activities shall request a refund whenever the contract price of any spare part or item of support equipment significantly exceeds the item's intrinsic value as defined in the clause at 5252.242-9000. Refunds shall be requested only for the difference between the intrinsic value of the item at the time an agreement on price was reached and the contract price. Refunds will not be requested to recoup the amount of cost decreases that occur over time due to productivity gains (beyond economic quantity considerations) or changes in market conditions.

(b) *Examples.* The following are examples of circumstances which may estab-

lish a basis for a refund request or pricing adjustment:

(1) A technical or engineering analysis results in a determination that the intrinsic value is significantly lower than the historical price.

(2) The price paid for an item bought competitively in similar quantity and circumstances (e.g., urgency, delivery terms) is significantly less than the former sole source price.

(3) Prices paid to the manufacturer of an item indicate the amount previously charged by the prime contractor for the item significantly exceeded the intrinsic value of the prime contractor's efforts in providing the item.

(c) *Solicitation provisions.* The contracting officer shall insert the clause at 5252.242-9000 in solicitations, Basic Ordering Agreements, and contracts (as defined in FAR 2.101) which contain or may contain requirements for spare parts or items of support equipment, except those contracts awarded as a result of competitive small purchase procedures and orders under federal supply schedules. If added to existing contracts, the clause will not apply to items or components ordered by the Government prior to the date of incorporation of the clause into the contract. Heads of Contracting Activities (HCAs) are delegated, without power of redelegation, authority to establish monetary thresholds below which refunds will not be requested.

[51 FR 46671, Dec. 24, 1986]

PART 5243—CONTRACT MODIFICATIONS

Subpart 5243.1—General

Sec.

5243.105 Availability of funds.

5243.105-90 Adjustments to prices under shipbuilding contracts.

5243.105-91 Definitions.

5243.105-92 Prohibited actions and procedures.

5243.105-93 Documentation and certification requirements.

5243.105-94 Solicitation provision and contract clause.

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 2405, DOD Directive 5000.35, and DFARS subparts 201.3 and 243.1.

SOURCE: 56 FR 63672, Dec. 5, 1991, unless otherwise noted.

Subpart 5243.1—General**5243.105 Availability of funds.****5243.105-90 Adjustments to prices under shipbuilding contracts.**

(a) 10 U.S.C. 2405 prohibits the Secretary of a military department from adjusting any price under a shipbuilding contract, entered into after December 7, 1983, for an amount set forth in a claim, request for equitable adjustment, or demand for payment under the contract (or incurred due to the preparation, submission, or adjudication of any such claim, request, or demand) arising out of events occurring more than 18 months before the submission of the claim, request, or demand.

(b) 10 U.S.C. 2405 provides that a claim, request, or demand is submitted only when the contractor has provided to the contracting officer the certification required by section 6(c)(1) of the Contract Disputes Act of 1978, if the matter is over \$50,000, and the supporting data for the claim, request, or demand.

(c) This subpart implements 10 U.S.C. 2405.

5243.105-91 Definitions.

As used in this subpart, the following terms have the meanings set forth below.

Claim means a written demand or written assertion by the contractor seeking, as a matter of right, a price adjustment under the contract. The theory upon which the contractor seeks the price adjustment does not determine whether a particular matter is a claim. The term includes a submission asserting any theory supporting a price adjustment, including but not limited to constructive change, breach of contract or mistake, which, if valid, would result in contractor entitlement to a price adjustment. A voucher, invoice or other routine request for payment that is not in dispute when submitted is not a claim. A claim does not include a request for equitable adjustment or demand for payment, as defined below.

Demand for payment means a written demand for payment, the granting of which results in a price adjustment

under the contract. A demand for payment does not include a routine request for payment in accordance with the payment terms of the contract.

Events means the Government action(s), Government inaction(s), Government conduct, or occurrence(s) which give rise to the contractor's claim, request for equitable adjustment, or demand for payment. The term events does not require the incurrence of costs and/or performance of additional work resulting from the action(s), inaction(s), conduct or occurrence(s) except where a contractor's commencement of the correction of defective GFI (including Government-furnished drawings and specifications)/GFP constitutes the final occurrence. For the purpose of this subpart, the date of the final Government action, Government inaction, Government conduct or occurrence is the date on which the 18 month period commences. The final Government action, Government inaction, Government conduct or occurrence and the date thereof for specific categories of liability are as follows:

(1) *Formal changes (including changes based on engineering change proposals (ECPs) and non-engineering change proposals (NECPs)).* The final Government action for a formal written change is the contracting officer's authorization or direction to proceed. The date the final Government action occurs is the date of receipt by the contractor of the contracting officer's authorization or direction to proceed. If the contracting officer unilaterally establishes the price of a previously issued maximum-priced modification, the unilateral pricing action is the final Government action. In this latter case, the date the final Government action occurs is the date of receipt by the contractor of the contracting officer's unilateral price determination.

(2) *Defective Government-furnished property.* The final Government action is the direction from the contracting officer regarding correction, replacement or repair of the property or notification that the property is not defective. The date the final Government action occurs is the date of receipt by the contractor of the contracting officer's

direction or notification. If a contractor proceeds to correct a deficiency in Government furnished property without direction from the contracting officer regarding the correction, replacement or repair of the property, the final occurrence is the contractor's commencement of the correction, replacement or repair of the property. (Neither an attempt to perform in accordance with defective Government furnished property nor an attempt to determine whether there is a defect in the property and development of one or more potential solutions to correct such defect constitutes the commencement of correction. Commencement of correction is performance of work which is inconsistent with or not required by the contract other than the identification of the defect and possible solutions.) In this latter case, the date of the final occurrence is the date the contractor commences the correction, replacement or repair of the property.

(3) *Defective Government-furnished specifications.* The final Government action is the contracting officer's direction regarding corrective action or notification that the specifications are not defective. The date the final action occurs is the date of receipt by the contractor of the contracting officer's direction or notification. If a contractor proceeds to correct a deficiency in a specification without direction from the contracting officer regarding the correction, the final occurrence is the contractor's commencement of the correction. (Neither an attempt to perform in accordance with a defective specification nor an attempt to determine whether there is a defect in the specification and development of one or more potential solutions to correct such defect constitutes the commencement of correction. Commencement of correction is performance of work which is inconsistent with or not required by the specification other than the identification of the defect and possible solutions.) In this latter case, the date of the final occurrence is the date the contractor commences the correction.

(4) *Defective Government-furnished drawings.* The final Government action is the contractor's receipt of a revised corrective drawing, if receipt con-

stitutes authorization or direction to proceed, otherwise, it is the contracting officer's direction regarding corrective action or notification that the drawing is not defective. The date the final Government action occurs is the date of receipt by the contractor of the revised drawing, if receipt constitutes authorization or direction to proceed, otherwise it is the date of receipt by the contractor of the contracting officer's direction regarding corrective action or notification that the drawing is not defective. If a contractor proceeds to correct a deficiency in a drawing before receipt of a revised drawing, or without direction regarding corrective action from the contracting officer, the final occurrence is the contractor's commencement of the correction. (Neither an attempt to perform in accordance with a defective drawing nor an attempt to determine whether there is a defect in the drawing and development of one or more potential solutions to correct such defect constitutes the commencement of correction. Commencement of correction is the performance of work which is inconsistent with the drawing or not required by the drawing other than the identification of the defect and possible solutions.) In this latter case, the date of the final occurrence is the date the contractor commences the correction.

(5) *Late Government-furnished property and information (including Government furnished equipment, material, specifications, drawings and other information).* The final Government action is the actual delivery of the Government-furnished property or information to the contractor, unless the contractor has previously received a notification from the contracting officer establishing a revised delivery date for the property or information, in which case such notification is the final Government action. The date the final Government action occurs is the date the property or information is delivered to the contractor or the date of receipt by the contractor of the aforementioned contracting officer's notification of a revised delivery date for the property or information.

(6) *Constructive changes (other than those specifically addressed in other sections of this subpart).* The final Government action, Government inaction, Government conduct or occurrence is the constructive authorization or direction to perform other than in accordance with the requirements of the contract. The date of the final Government action, Government inaction, Government conduct or occurrence is the date the contractor receives such constructive authorization or direction from an authorized Government representative.

(7) *Breach of contract, impossibility, impracticability, unconscionability, mistake, misrepresentation and superior knowledge.* These theories do not always allow an objective definition of the final Government action, Government inaction, Government conduct or occurrence. For assertions of breach of contract, impossibility, impracticability or unconscionability, the date of the final occurrence is the date on which the contractor knew or should have known of the breach of contract, impossibility, impracticability or unconscionability. For assertions of mistake or misrepresentation, the date of the final occurrence is the date on which the contractor knew or should have known of the mistake or misrepresentation. For assertions of superior knowledge, the date of the final occurrence is the earlier of the date on which the contractor knew or should have known of the superior knowledge or the date on which the contractor knew or should have known of the information that was not disclosed.

Knew or should have known includes the totality of the combined actual and constructive knowledge of all agents or employees (including a subcontractor, its agents and employees, where and to the extent a subcontractor is involved).

Price adjustment means an increase in the fixed price, target price, ceiling price, or final price of a fixed price type contract, or an increase in the fee structure of a cost reimbursement type contract, or monetary damages or other payment resulting from a contractor claim, request for equitable adjustment, or demand for payment. An adjustment to the sharing ratio or to any other pricing formula, procedure

or provision, which has the effect of increasing the fixed price, target price, ceiling price, final price, or fee of the contract, is a price adjustment. A schedule adjustment, whether requested as part of a submission seeking a price adjustment or as the sole relief, or an adjustment for any matter which, pursuant to the terms of the contract is separate from or not included in the fixed price, target price, ceiling price or final price of a fixed price contract or the fee structure of a cost reimbursement contract, is not a price adjustment. The bilateral definitization of a maximum-price modification within the maximum price is not a price adjustment. A routine invoice or other request for payment or reimbursement in accordance with the terms of the contract, even if in dispute, which, if paid, would not result in an increase in the price of the contract is not a price adjustment. For the purpose of this subpart, relief granted pursuant to a request for extraordinary contractual relief under Pub. L. 85-804 does not constitute a price adjustment.

Request for equitable adjustment means a written request for a price adjustment under the contract.

Shipbuilding contract means a contract which provides for the construction of a ship which is of a type that is designated as a ship. (If the Navy is entering into a contract on behalf of another department, agency or activity of the federal Government, and such department, agency or activity involved designates the item being constructed as a ship, the contract is a shipbuilding contract.) A contract which includes items in addition to the construction of a ship is a shipbuilding contract. A contract for the conversion, reactivation, overhaul, or repair of a ship is not a shipbuilding contract. A contract for the acquisition of any type of vessel which type is not designated as a ship is not a shipbuilding contract.

5243.105-92 Prohibited actions and procedures.

(a) This subpart does not preclude:

(1) Bilateral modifications which are fully priced or maximum-priced prior to the contractor being authorized or

directed to proceed by the contracting officer,

(2) Any pricing action which is either fully priced or maximum-priced, based on events which occurred less than 18 months prior to the execution of the bilateral modification incorporating the pricing action, or

(3) The bilateral definitization of a maximum price within the maximum price established through an action identified in paragraph (a) (1) or (2) of this section.

(b) Contracting officers may not adjust any price under a shipbuilding contract entered into after December 7, 1983, for an amount set forth in a claim, request for equitable adjustment, or demand for payment arising out of events occurring more than 18 months before the submission of a claim, request, or demand accompanied by adequate supporting data and, if the matter is over \$50,000, the certification required by section 6(c)(1) of the Contract Disputes Act.

(c) In reviewing a claim, request for equitable adjustment, or demand for payment to determine whether the claim, request or demand, or any part thereof, is subject to the prohibition set forth in paragraph (b) of this section, contracting officers shall consider the theory upon which the contractor relies, the terms of the contract, and all pertinent Government action(s), Government inaction(s), Government conduct and occurrence(s). Claims, requests or demands arising out of different events included in a single claim, request, or demand shall be reviewed based on the events appropriate to each individual claim, request or demand and a determination of the application of the prohibition set forth in paragraph (b) of this section shall be made for each such claim, request or demand.

5243.105-93 Documentation and certification requirements.

(a) For the purpose of this subpart, a claim, request for equitable adjustment, or demand for payment is not submitted until the contractor has furnished to the contracting officer adequate supporting data and, if the matter is over \$50,000, the certification required by section 6(c)(1) of the Contract

Disputes Act. If either the supporting data or the certification, if required, is deficient, the claim, request, or demand shall not be considered to be submitted until any such deficiency is corrected.

(b) *Adequate supporting data.* (1) The contractor has the burden and obligation to provide adequate supporting data to the contracting officer. Supporting data for a claim, request for equitable adjustment, or demand for payment is necessary not only to satisfy the statutory requirement but also to apprise the contracting officer of the underlying facts and the theory upon which the contractor relies in support of its entitlement to a price adjustment. To be considered adequate, a claim, request or demand must be accompanied by supporting data which fulfills these purposes in accordance with the requirements of the Contract Disputes Act. A submission containing the following information will be deemed to have been submitted with adequate supporting data:

(i) A narrative statement of the nature of the event(s), the time when the event(s) occurred (including the factual basis supporting the contractor's designation of the time the event(s) occurred), and the causal relationship between the event(s) and the impact on the cost of performance of the contract, including a description of how the event(s) affected scheduled performance;

(ii) A description of the relevant effort the contractor was required to perform in the absence of the event(s);

(iii) A description of the relevant effort the contractor was actually required or will be required to perform;

(iv) A description of components, equipment, and other property involved;

(v) A cost breakdown of the additional effort by element in accordance with the contractor's normal procedures for pricing of changes;

(vi) A description of all property which will no longer be needed by the contractor;

(vii) A description of any delay caused by the event(s);

(viii) A description of any disruption caused by the event(s).

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(2) If any submission does not contain the data listed above, the submission shall be reviewed to determine if the data submitted is adequate to meet the requirements of the Contract Disputes Act. The contractor shall be notified of the nature of any deficiency in the supporting data which results in a determination that the submission is not adequate.

(c) *Certification.* (1) A claim, request for equitable adjustment, or demand for payment in excess of \$50,000 must be certified in accordance with the requirements of section 6(c)(1) of the Contract Disputes Act. (See FAR 33.207.) If any submission does not contain a proper certification, the contractor shall be informed of any deficiency in the certification.

(2) A claim, request for equitable adjustment, or demand for payment certified in accordance with DFARS 233.7000(a) shall be considered to meet the certification requirements set forth in (c)(1) of this section.

(d) Once a claim, request for equitable adjustment, or demand for payment has been properly certified and accompanied by adequate supporting data, the date of proper certification and submission of adequate supporting data shall be operative for purposes of this subpart, even if additional certification(s) or data submission(s) is required of, or provided by, the contractor supplementing the original submission or revising the amount requested or theory of recovery, unless the additional certification or data submission is required or provided because the contractor has submitted a new or essentially new claim, request, or demand based on different events.

5243.105-94 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 5252.243-9000, Notification of Applicability of 10 U.S.C. 2405, in all solicitations for shipbuilding contracts.

(b) The contracting officer shall insert the clause at 5252.243-9001, Requirements for Adequate Supporting Data and Certification of Any Claim, Request for Equitable Adjustment, or Demand for Payment in all shipbuild-

ing solicitations and shipbuilding contracts.

PART 5252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 5252.2—Texts of Provisions and Clauses

5252.215-9000 Submission of cost or pricing data.

5252.242-9000 Refunds.

5252.243-9000 Notification of applicability of 10 U.S.C. 2405.

5252.243-9001 Requirements for adequate supporting data and certification of any claim, request for equitable adjustment, or demand for payment.

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 2405, DOD Directive 5000.35, and DFARS subparts 201.3 and 243.1.

SOURCE: 53 FR 16282, May 6, 1988, unless otherwise noted.

Subpart 5252.2—Texts of Provisions and Clauses

5252.215-9000 Submission of cost or pricing data.

As prescribed at 5215.407, insert the following provision:

SUBMISSION OF COST OR PRICING DATA (NOV 1987)

(a) It is expected that this contract will be awarded based upon a determination that there is adequate price competition; therefore, the offeror is not required to submit or certify cost or pricing data (SF 1411) with its proposal.

(b) If, after receipt of the proposals, the contracting officer determines that adequate price competition does not exist in accordance with FAR 15.804-3, the offeror shall provide certified cost or pricing data as requested by the contracting officer.

(End of clause)

ALTERNATE I (NOV 1987)

As prescribed at 5215.407, substitute the following paragraph (b):

(b) If, after receipt of the proposals, the contracting officer determines that adequate price competition does not exist, the offeror shall provide certified cost or pricing data as requested by the contracting officer. The